IN THE SUPREME COURT OF ARKANSAS

No. 9924

Carl F. Parker, Commissioner of Revenue for the State of Arkansas, appellant,

v.

Kern-Limerick, Inc., and United States of America, appelee and intervenor

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Kern-Limerick, Inc., and the United States of America, appellants (in the Supreme Court of the United States), submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Arkansas entered in this cause.

OPINIONS BELOW

The decree of the Pulaski County Chancery Court is not reported. The opinion of the Supreme Court of the State of Arkansas reversing that decree is reported at 254 S. W. (2d) 454. Copies of the Chancery Court decree and the opin-

ions of the Supreme Court are attached hereto in Appendix B and C respectively.

JURISDICTION

1. The judgment of the Supreme Court of the State of Arkansas was entered on January 12, 1953. A petition for rehearing was seasonably filed by appellants Kern-Limerick, Inc., and the United States on January 29, 1953, was entertained, and was denied on February 23, 1953. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1257(2) and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Standard Oil Co.* v. *Johnson,* 316 U.S. 481; *United States* v. *Allegheny County,* 322 U.S. 174, 191; *United States* v. *Burnison,* 339 U.S. 87; *Penn Dairies* v. *Milk Control Comm'n.,* 318 U.S. 261; *Pacific Coast Dairy* v. *Department,* 318 U.S. 285; *Esso Standard Oil* v. *Evans,* Nos. 330 and 378, decided by the Supreme Court on May 4, 1953; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282.

2. In its petition filed in the Chancery Court of Pulaski County, Arkansas, appellant Kern-Limerick, Inc., alleged that the imposition of the Arkansas Gross Receipts tax under the facts of this case "is invalid on the ground that it is repugnant to the Constitution of the United States * * *" (Tr. 2) and "that by imposing a gross receipts tax upon such transaction the defendant has construed

and applied the Arkansas Gross Receipts Act of 1941 in a manner which renders that statute invalid under the Constitution of the United States of America" (Tr. 2). In intervening, the United States adopted these allegations. (Tr. 17-18.) The Chancery Court of Pulaski County, Arkansas, ruled favorably upon these contentions, saying (Tr. 22; Appendix B):

> The Court doth further find that the said sale by the plaintiff is a sale to the United States Government and is exempt from taxation under the provisions of The Gross Receipts Act of 1941; that the imposition of the gross receipts tax upon said sale is repugnant to the Constitution of the United States of America in that it violates the immunity of the United States of America from taxation by states or political subdivisions thereof; and that by imposing a gross receipts tax upon the said transaction the defendant has construed and applied The Arkansas Gross Receipts Act of 1941 in a manner which renders that statute invalid under the Constitution of the United States of America.

On appeal to the Supreme Court of Arkansas, appellants Kern-Limerick, Inc., and the United States urged as Point III of their brief (pp. 26-28) that "The construction placed on the Arkansas Gross Receipts Tax Act of 1941 by the State of Arkansas to impose a tax on the transaction here involved render that statute invalid under the Constitution of the United States of America", and in

Point IV of their brief (pp. 28-30) urged that "The imposition of the Arkansas Sales Tax on the transaction here involved violates the immunity of United States of America from taxation by the states or their political subdivisions." It was contended in these arguments that the sale involved here was made to the United States and the taxing act would be unconstitutional if applied.[1] The Supreme Court of Arkansas, holding that the sale in question was not made to the United States but to its contractor, considered *Alabama* v. *King & Boozer,* 314 U. S. 1, as controlling, and held the Arkansas Gross Receipts taxing act valid as applied here. See Appendix C.

3. The validity of the Arkansas statute was drawn in question and sustained and the Supreme Court of the United States therefore has jurisdiction of this appeal under 28 U.S.C. 1257 (2), even though the Arkansas statute expressly exempts gross receipts "derived from sales to the United States Government" (Arkansas Statutes, 1947, Sec. 84-1904(g), Appendix A), and the State Supreme Court purported to bring the case within the terms of the Act by holding that the sale here was not to the United States. In so holding, the State Supreme Court was applying federal law and

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[1] The present appellants also contended, on the appeal to the Supreme Court of Arkansas, that under the applicable federal law, the Navy could validly enter into the construction contract involved in this case. See Supplemental Abstract and Brief for Appellee in the Supreme Court of Arkansas, pp. 12-14, 30-36, and Brief of Appellee and Intervenor on Petition for Rehearing, pp. 10-12.

was upholding the validity of the Arkansas statute as it pertained to the present facts. This precise point was considered and decided in *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 482-3, in which a California motor vehicle fuel license tax statute likewise exempted sales to the United States; the Supreme Court of the United States upheld its jurisdiction on appeal.

4. The Supreme Court of the United States has jurisdiction to consider those issues presented herein which may not be appealable under 28 U.S.C. 1257(2) but are reviewable by certiorari under 28 U.S.C. 1257(3), since all such issues are included in the Assignment of Errors filed herewith. See *Flournoy* v. *Wiener,* 321 U. S. 253, 263; *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 547; *Wilson* v. *Cook,* 327 U.S. 474, 482. See also 28 U.S.C. 2103.

QUESTIONS PRESENTED

1. Whether the Arkansas Gross Receipts tax statute can constitutionally be applicable to a sale by a vendor of equipment used in the performance of a cost-plus-fixed-fee contract with the United States, where the purchase was in the name of the United States and not of the contractor, title to the equipment passed directly from the vendor to the United States, and the United States alone was obligated to the vendor for payment of the purchase price.

2. Whether the purchasing arrangement established in the cost-plus contract involved here was

authorized by the Armed Services Procurement Act of 1947.[1a]

STATUTES INVOLVED

The pertinent provisions of the Arkansas Gross Receipts tax statute (Act No. 386 of Acts of Arkansas of 1941) and of the Armed Services Procurement Act of 1947 are set forth in Appendix A.

STATEMENT

1. Through the Department of the Navy, the United States negotiated and entered into a cost-plus-fixed-fee contract with a joint venture composed of Winston Bros. Company, C. F. Haglin and Sons Co., Missouri Valley Constructors, Inc., and Sollitt Construction Company, Inc. (hereinafter called the contractor or WHMS) for the construction and completion of the Naval Ammunition Depot at Shumaker, Arkansas. This contract was entered into under Sections 2 (c)(10) and 4(b) of the Armed Services Procurement Act of 1947 (Appendix A).

In the course of the construction, certain heavy equipment was purchased from appellant Kern-Limerick, Inc., of Little Rock, Arkansas. The method of authorizing, conducting, and consummating such a purchase, and the instruments required by the United States to be used in connection therewith, are not in dispute.

When the contractor desired such equipment, it made a "Purchase Request" therefor to a desig-

[1a] All the points raised in the Assignment of Errors are also presented. The Questions Presented stated above set forth the major issues.

nated officer of the United States. The United States reviewed and approved the request or, in the event of disapproval, the equipment would not be purchased. After approval by the officer of the United States, the contractor prepared and mailed to possible vendors a "Request for Bid,"[2] which recited "Please quote herein, subject to conditions on reverse side, your lowest price for the following material to be delivered * * *." One of the conditions was as follows:

> 3. This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price, but the Contractor shall handle all payments hereunder on behalf of the Government. The Vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof.

A number of bids were submitted, which were opened by and read in the presence of representatives of the contractor and two representatives of the United States, and the bid of appellant Kern-Limerick, Inc., was recommended as the lowest acceptable bid. The purchase contract was prepared accordingly, and when it had been approved by an

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[2] This "Request for Bid" was in the name of the Bureau of Yards and Docks, Navy Department, "by" the contractor as "purchasing agent".

official of the United States, it was forwarded to Kern-Limerick, Inc., on a "Purchase Order" which provided as a condition of the purchase the same condition number 3 quoted above. At that time, federal funds were available and had to be available for the payment of the purchase price. If federal funds had not been available, the purchase order would not have been forwarded to Kern-Limerick, Inc.

Kern-Limerick, Inc., shipped the equipment to the officer in charge of construction (a United States Naval Officer, acting for the Contracting Officer, who was the Chief of the Bureau of Yards and Docks, Navy Department) in care of the contractor, at Shumaker, Arkansas, where it was received, inspected, and approved by a representative of the United States and a representative of the contractor, both being required to be present.

Kern-Limerick, Inc., submitted its invoice to the contractor under the provisions of condition number 3 quoted above. The contractor paid it and was reimbursed by the United States.

Under the terms of the purchase, as set forth above, title passed from Kern-Limerick, Inc., directly to the United States, without passing through the contractor, and for the payment of the purchase price the credit of the United States only was pledged. Possession of the equipment was delivered to the United States, through its own officers. All this was in accord with the contract of WMHS with the United States which expressly provided (Article 8) (a) that in purchasing sup-

plies and equipment the contractor was to be "the purchasing agent of the Government * * * and the Government shall be directly liable to the vendors for the purchase price," (b) that title to all supplies was to pass directly from the vendor to the Government, and (c) that all purchases over $500 had to have the written approval of the Officer-in-Charge.

2. Act No. 386 of the Acts of Arkansas of 1941 (Arkansas Statutes, 1947, Sec. 84-1902 *et seq.*) imposes a 2% gross receipts tax on sales within the state. See Appendix A. Taxable sales are defined as transfers "of either title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished," and are expressly declared to include sales of supplies and equipment to contractors "who use same in the performance of any contract." However, there is specifically exempted from taxation the "gross receipts or gross proceeds derived from sales to the United States Government." Where a tax is payable, the vendor is required to collect the tax from the purchaser.

The Arkansas Revenue Commissioner demanded payment of the tax from appellant Kern-Limerick, Inc., in the amount of $342.93. The United States refused to pay the tax, so that Kern-Limerick, Inc., filed a gross receipts tax return covering the transaction, paid the amount of the tax under protest, demanded a refund of the tax and a hearing to determine whether the sale was taxable. After

a hearing, the State Commissioner of Revenues found the sale taxable and Kern-Limerick, Inc., brought suit for refund in the Chancery Court, Second Division, Pulaski County, Arkansas, as provided by State law. The United States intervened in the suit. On a trial of the issues, the Chancery Court entered its decree that the sale was not taxable and ordered a refund (Appendix B). The Commissioner of Revenues appealed to the State Supreme Court.

The Arkansas Supreme Court, two members dissenting and one member not participating, held that the sale was to the contractor, not to the United States, and was taxable, and also apparently held that the United States was without authority to employ the contractor to act for it in purchasing equipment. The dissenting opinion expressed the view that if the sale in question was not to the United States, then it was impossible to conceive of a sale to the United States.

THE QUESTIONS ARE SUBSTANTIAL

1. For the construction of the Naval Ammunition Depot at Shumaker, Arkansas, the procedure for making purchases and all the incidental forms, including the order of purchase which constituted the purchase contract itself, required that the sales be to the United States and pledge the credit of the United States only. In these vital respects the transaction with the vendor, Kern-Limerick, Inc., differs markedly from that before the Supreme Court in the controlling case of *Alabama* v. *King*

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& Boozer, 314 U.S. 1, a decision which turned wholly on the circumstance that the significant factors in the purchase transaction were directly opposite to those present here.

In *King & Boozer,* the agreement between the cost-plus contractor and the United States provided that the contractor had to make all purchase contracts in its own name, and could not bind or purport to bind the Government (314 U.S., at 11). In this case, the contract of purchase had to be made in the name of the United States and was not to bind or purport to bind the contractor. In *King & Boozer,* the sale was in terms to the contractor and not to the Government (314 U.S. at 12 fn. 2); here, the sale was in terms made to the United States and not to the contractor. In *King & Boozer,* the contractor was required to pledge his own credit and was prohibited from pledging the credit of the United States (314 U.S. at 11, 11-12, 13). In the present case, only the credit of the United States is pledged and the vendor so understands. In *King & Boozer,* the Court expressly found that the United States was not obligated to pay the purchase price (314 U.S. at 13). In the present case, it is difficult to comprehend how the United States could escape being liable to pay the purchase price.

There are other material differences in the facts of the two cases. In *King & Boozer,* title to the purchased materials could vest for an appreciable period in the cost-plus contractor (314 U.S. at 10, 13-14), while in this case it was expressly con-

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templated that the contractor was never to have title. The arrangments for purchases in *King & Boozer* required the contractor to insert in its purchase agreements a provision that the agreement was assignable to the Government (314 U.S. at 11); here, the purchase agreement was initially made with the Government and there could be no occasion for assignment. Unlike the earlier case, in the present case funds appropriated by Congress had to be available before the purchase was completed; bids in response to a Request for Bid had to be approved by a Navy representative as well as the contractor's employee; and the actual purchase order had to be approved by a naval officer.

The *King & Boozer* decision indisputably pivots on these very factors in which the present case differs. The Court declared that the "precise question" was "whether the Government became obligated to pay for the lumber" (314 U.S. at 10) and concluded that "the legal effect of the transaction which we have detailed was to obligate the contractors to pay for the lumber" (314 U.S., at 12). The thread binding the entire opinion and by which taxability was marked, was that the contractor and not the Government was bound for the purchase price (314 U.S. at 10, 12, 13, 14). The contractor and not the Government was the purchaser, and therefore the state tax was not levied on a federal transaction. The situation is reversed in this case; the Government and not the contractor is the purchaser and the impost is therefore squarely on the Government. In these circum-

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stances the rationale of the *King & Boozer* decision points directly to a result opposite to that reached there. Construed as it has been by the Arkansas Supreme Court to cover these sales, the state statute is invalid. See also *Mayo* v. *United States,* 319 U.S. 441, 447; *United States* v. *Allegheny County,* 322 U.S. 174, 176-177, 186, 189, 192; *S.R.A., Inc.* v. *Minnesota,* 327 U.S. 558, 561-2; *Esso Standard Oil Co.* v. *Evans,* Nos. 330 and 378, this Term, decided May 4, 1953, slip op., p. 5.

2. The Supreme Court of Arkansas also erred in holding that the cost-plus contract between the United States and WHMS could not validly make WHMS the Navy's purchasing agent to the extent that it was. Article 40 of the contract specifies that it is made under the authority of Section 2(c) (10) and 4(b) of the Armed Services Procurement Act of 1947 (Appendix A, *infra*), "and any required determination and findings with respect thereto have been made". Under those sections of the Procurement Act, the personal approval of the Secretary of the Navy is not required, and the approval which was given by a representative of the Bureau of Yards and Docks suffices. See Section 7, Appendix A, *infra.*[3] Moreover, the particular purchase from Kern-Limerick, Inc., was authorized by a naval officer, as were the terms of the purchase order itself. All the requirements of the Procurement Act were therefore fulfilled and

[3] The Secretary of the Navy orally approved the Ammunition Depot project and the selection of WHMS as contractor.

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the State Supreme Court clearly erred in attempting to decide for itself whether the administrative determinations required by the statute for negotiated agreements had been correctly made.

3. The questions involved are substantial and important, for the United States has been and is engaged in a large amount of construction work based on similar cost-plus-a-fixed-fee contracts, with similar tax statutes applicable, and it is important to the United States, as well as to the states and vendors to the Government, that these questions be settled. The Bureau of Yards and Docks of the Navy Department has used similar purchasing arrangements since 1943, and until this case state revenue authorities have not sought to tax such purchases.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General,
Counsel for the United States.

A. F. HOUSE,
WILLIAM NASH,
Counsel for Kern-Limerick, Inc.

MAY, 1953.

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APPENDIX A

Arkansas Statutes, 1947:

SEC. 84-1902.—*Definitions.*—* * *

* * * * *

(c) Sale: The term "sale" is hereby declared to mean the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished. * * *

* * * * *

(i) Consumer-User. The term "consumer" or "user" means the person to whom the taxable sale is made, or to whom saxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this act * * *.

* * * * *

SEC. 84-1903. *Two per cent tax levied.*—There is hereby levied an excise tax of two [2%] per centum upon the gross proceeds or gross receipts derived from all sales to any person subsequent to the effective date of this act * * *, of the following:

(a) Tangible Personal Property.

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(e) * * *

Sales of service and tangible personal property including materials, supplies and equipment made to contractors who use same in the performance of any contract are hereby declared to be sales to consumers or users and not sales for resale. * * *

SEC. 84-1904. *Exemptions from tax.*—There is hereby specifically exempted from the tax imposed by this act the following:

* * * * *

(g) Gross receipts or gross proceeds derived from sales to the United States Government.

* * * * *

SEC. 84-1908. *Collection of tax by persons furnishing taxable service—Tokens-Redemption of—Priority of tax claim.*—* * *

* * * * *

The seller, or person furnishing such taxable service, shall collect the tax levied hereby from the purchaser.

* * * * *

Armed Services Procurement Act of 1947 (Act of February 19, 1948, ch. 65, 62 Stat. 21):

Sec. 2. * * *

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such pur-

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chases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of national emergency declared by the President or by Congress;

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $1,000;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical supplies;

(8) for supplies purchased for authorized resale;

(9) for perishable subsistence supplies;

(10) for supplies or services for which it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test: *Provided*, That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been en-

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tered into pursuant to this subsection (11) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder;

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for supplies of a technical or specialized nature requiring a substantial initial investment or an extended period of preparation for manufacture, as determined by the agency head, when he determines that advertising and competitive bidding may require duplication of investment or preparation already made, or will unduly delay procurement of such supplies;

(15) for supplies or services as to which the agency head determines that the bid prices after advertising therefor are not reasonable or have not been independently arrived at in open competition: *Provided,* That

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no negotiated purchase or contract may be entered into under this paragraph after the rejection of all bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder, (B) the negotiated price is lower than the lowest rejected bid price of a responsible bidder, as determined by the agency head, and (C) such negotiated price is the lowest negotiated price offered by any responsible supplier;

(16) the agency head determines that it is in the interest of the national defense that any plant, mine, or facility or any producer, manufacturer, or other supplier be made or kept available for furnishing supplies or services in the event of a national emergency, or that the interest either of industrial mobilization in case of such an emergency, or of the national defense in maintaining active engineering, research and development, are otherwise subserved: *Provided,* That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (16) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder; or

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(17) otherwise authorized by law.

*   *   *   *   *

Sec. 4. * * *

(m) The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). Neither a cost nor a cost-plus-a-fixed-fee contract nor any incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure supplies or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract. All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a

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cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either $25,000 or 5 per centum of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

* * * * *

Sec. 7. (a) The determinations and decisions provided in this Act to be made by the Agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

(b) The power of the agency head to make the determinations or decisions specified in paragraphs (12), (13), (14), (15), and (16) of section 2 (c) and in section 5 (a) shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 2 (c) shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not

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require the expenditure of more than $25,000.

(c) Each determination or decision required by paragraphs (11), (12), (13), (14), (15), or (16) of section 2 (c), by section 4 or by section 5 (a) shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination. A copy of the findings shall be submitted to the General Accounting Office with the contract.

(d) In any case where any purchase or contract is negotiated pursuant to the provisions of section 2 (c) except in a case covered by paragraphs (2), (3), (4), (5) or (6) thereof, the data with respect to the negotiation shall be preserved in the files of the agency for a period of six years following final payment on such contract.

APPENDIX B

Chancery Court of Pulaski County

(Caption omitted.)

Decree

On this day appeared the plaintiff, Kern-Limerick, Inc., by its Solicitors, Rose, Meek, House, Barron & Nash, the defendant, Carl F. Parker, Commissioner of Revenues for the State of Arkansas, by its Solicitor, O. T. Ward, and the Intervenor, United States of America, by its Solicitor, Berryman Green, and upon a showing that

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Dean R. Morley is no longer the Commissioner of Revenues for the State of Arkansas and oral motion of O. T. Ward, the cause of action is hereby revived in the name of and against Carl F. Parker, presently the Commissioner of Revenues for the State of Arkansas and successor to Dean R. Morley; and all parties hereto announcing ready for trial, this cause is submitted to the Court upon the petition of Kern-Limerick, Inc. with its exhibits, the response of the defendant thereto, the intervening petition of the United States of America, the answer of the defendant thereto, stipulation of counsel with its exhibits filed herein, and argument of counsel; and the Court being well and sufficiently advised as to all matters of fact and law arising herein, doth find that on December 14, 1950, the plaintiff sold and delivered to the United States of America, f.o.b. Shumaker, Arkansas, two (2) Allis-Chalmers HD-50 Diesel tractors for $8,573.33 each, or for a total price of $17,146.66; that the sale was made upon the purchase order of the Navy Department, Bureau of Yards and Docks, by Winston Bros. Company, C. F. Haglin and Sons Co., The Missouri Valley Constructors, Inc., and Sollitt Construction Company, Inc., as the purchasing agent for the United States of America, and under their contract with the United States of America, designated as NOy 23197; that the United States of America and Winston Bros. Company, C. F. Haglin and Sons Co., The Missouri Valley Constructors, Inc., and Sollitt Construction Company, Inc., refused to pay on the said transaction any tax as a gross receipts tax due under The Arkansas Gross Receipts Act of 1941; that on the 11th day of September, 1951, plaintiff filed with the

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defendant a gross receipts tax return covering the said transaction and tendered under protest the sum of $342.93 demanded and claimed by the defendant to be due as a gross receipts tax on the said transaction; that with the said tender plaintiff made demand in writing for a refund of the said payment and requested the defendant to grant a hearing to determine whether the said transaction is taxable under the provisions of The Arkansas Gross Receipts Act of 1941; that the defendant granted plaintiff's request and held said hearing on the 24th day of September, 1951; that upon said hearing the defendant issued an order finding that the said transaction is taxable and the tax due under the provisions of the said The Arkansas Gross Receipts Act of 1941, but further finding that no penalty should be assessed on account of said tax; that the plaintiff within proper time filed its petition for a refund; and that the United States of America properly intervened herein and is a proper party to this action.

The Court doth further find that the said sale by the plaintiff is a sale to the United States Government and is exempt from taxation under the provisions of The Gross Receipts Act of 1941; that the imposition of the gross receipts tax upon said sale is repugnant to the Constitution of the United States of America in that it violates the immunity of the United States of America from taxation by states or political subdivisions thereof; and that by imposing a gross receipts tax upon the said transaction the defendant has construed and applied The Arkansas Gross Receipts Act of 1941 in a manner which renders that statute invalid under the Constitution of the United States of America.

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It is, therefore, by the Court considered, ordered, adjudged and decreed that the plaintiff recover from the defendant the sum of $342.93, together with its costs herein expended.

The defendant objects to the findings of the Court, and its order granting relief to the plaintiff, and prays an appeal, which appeal is hereby granted.

This order having been granted on the 23rd day of April, 1952, but omitted from record, is ordered to be entered now for then.

APPENDIX C

Supreme Court of Arkansas

(Caption omitted.)

Opinion

The United States of America, through and on behalf of the Navy Department, entered into a written contract (designated as NOy23197) with Winston Bros. Company, C. F. Haglin and Sons Company, Missouri Valley Contractors, Inc., and Sollitt Construction Company, Inc. (hereinafter referred to as WHMS) to construct a Naval Ammunition Depot at Shumaker, Arkansas, the total cost of which was approximated at $30,800,000.00. By the terms of the contract of employment WHMS was to procure all labor, supplies, materials, etc., necessary for constructing and equipping said depot and pay for the same, and the Government was to reimburse WHMS for all such expenditures and pay them, in addition, the sum of

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$580,000.00 for their services as contractors. The type of contract referred to is designated and is generally known as a "Cost-Plus-a-Fixed-Fee Contract." Other provisions of the contract will be specifically mentioned later.

The question herein to be decided arose in the manner presently set forth. On December 14, 1950 Kern-Limerick, Inc., a machinery and equipment company of Little Rock, Arkansas, sold to WHMS (as contended by appellant) or to the United States (as contended by the latter) two diesel tractors for a total price of $17,146.66, and the tractors were delivered at the site of construction at Shumaker, Arkansas. The Revenue Commissioner for the State of Arkansas demanded payment from Kern-Limerick, Inc. in the sum of $342.93 as a 2% tax on the sale price pursuant to the provisions of the Arkansas Gross Receipts Act of 1941. Payment of the tax was made under protest by Kern-Limerick, Inc. and later suit was filed in the Chancery Court of Pulaski County, Arkansas for the recovery of the amount so paid. The United States intervened in this suit, contending that the sale in question was a sale to it and that consequently no tax was collectible thereon by the State of Arkansas. The Chancery Court held with the contention of the United States and the Commissioner of Revenues for the State of Arkansas has appealed to this Court for a reversal.

The 1941 Gross Receipts Act, refered to before, provides that no tax shall be paid on sales to the United States; therefore, the question confronting this Court is whether the sale in question was made to WHMS or to the United States. To answer this

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question it is necessary to examine the provisions of the contract between WHMS and the United States and to do so in the light of court decisions relating thereto.

In order to obtain the savings in money and time that may reasonably be expected by the negotiation of a cost-plus contract such as the one here involved, it is obvious that the U. S. Government must maintain, and so the contract must provide, effective control over all purchases by the contractor; otherwise, the Government could not be assured it would receive standard materials and services at the lowest possible prices. Therefore, as would be expected, the United States in this case wrote into its contract with WHMS provisions for strict control of all purchases of labor, materials, and equipment which were to be used in or for the construction of the Ammunition Depot.

Contract. Some of the pertinent provisions were: (a) All applications for purchases, all bids, and all purchases must be made on Government (Navy) forms and all must be approved by an Officer in Charge who was an officer representing the Navy Department; (b) After approval WHMS consummated the transaction by paying the purchase price and taking delivery at the site of construction at Shumaker, Arkansas; (c) Upon presentation of the evidences of purchase and upon a showing that all requirements had been complied with, the purchase price paid, and delivery made, the Government would reimburse WHMS. Before reimbursement it must also appear that the Government had appropriated money for that purpose; (d) Title to the property so purchased never vested

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in WHMS but did vest in the United States; (e) WHMS was acting as purchasing agent for the United States in negotiating all purchases; (f) The United States was obligated to the vendor to pay the purchase price; and (g) The vendor was to make demand for payment by submitting an invoice to WHMS.

Some of the terms of the contract, including those designated (e), (f) and (g) above, were printed on the back of all "Request for Bids" and "Purchase Order" blanks which went to prospective vendors.

Arkansas Statute. That tax sought to be imposed herein by the Arkansas Revenue Commissioner is levied by Act No. 386 of 1941, which specifies a tax of 2% (*Ark. Stats.* 84-1903) upon the gross proceeds derived from all sales, and requires the vendor (*Ark. Stats.* 84-1908) to pay the tax to the Comissioner. Some other pertinent provisions of said Act No. 386 are set out below.

(1) *Ark. Stats.* 84-1902 (c):

> Sale: The term 'sale' is hereby declared to mean the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished.

(2) *Ark. Stats.* 84-1902 (i):

> Consumer-User: The term 'consumer' or 'user' means the person to whom the taxable sale is made, or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal

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property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this Act.

(3) *Ark. Stats.* 84-1903 (e)—last paragraph:

Sales of service and tangible personal property including materials, supplies and equipment made to contractors who use same in the performance of any contract are hereby declared to be sales to consumers or users and not sales for resale.

As has been previously stated, the vital question is: Who was the "purchaser" in this instance? Was is WHMS or the United States? It is conceded that if it was the former the tax is collectible, and if it was the latter the tax is not collectible. The opinion of the United States Supreme Court in the case of *Alabama* v. *King and Boozer* (which will be cited later), in which this same question was under consideration, contains this language: "Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority." Giving a reasonable interpretation to the language of the Arkansas Gross Receipts Act as it is set out in sub-paragraphs above (1) defining a Sale, (2) defining Consumer-User, and (3) relating to contractors, and having in mind all the provisions of the contract between WHMS and the United States, we are of the opinion that WHMS was the "purchaser" in this instance and that consequently

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Kern-Limerick, Inc. is liable to the Commissioner for the tax on the two tractors which it sold.

Notwithstanding the above, however, it is obvious that the State of Arkansas could not arbitrarily define WHMS as the "purchaser" and thereby impose a tax on the United States Government if in fact and in truth the latter was the purchaser in this instance, and so we will proceed to consider the question from that standpoint after making this further observation. In determining whether or not the State of Arkansas has acted arbitrarily in enacting this particular Act with the language it contains depends on whether the Act is discriminatory, and, particularly in this instance, whether it discriminates against the United States. The opinion referred to above recognizes this test and makes it clear that the mere fact that the tax is eventually passed on to the Federal Government is no indication it is discriminatory or that it violates the immunity of the Government. In our opinion the Arkansas Statute meets all the tests.

Was the United States the Purchaser? In coming to the conclusion that the United States was not, in this instance, the "purchaser", we base our decision primarily on the opinion in the case of *Alabama* v. *King and Boozer,* 314 U. S. 1, decided in 1941. The question for decision in that case was the same as presented here and was based on facts, with the exceptions later noted, very similar to the facts of this case. The opinion which overruled some former decisions and approved others is comprehensive and logical and appears to be a landmark case on the issue involved. It upheld the imposition of a sales tax by an Alabama Statute on the sale of lumber by King and Boozer to a

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cost-plus-a-fixed-fee contractor who was engaged in constructing a project for the Government pursuant to a contract presently to be mentioned.

For the sake of brevity it suffices for this opinion to say that the Government contract in the *King and Boozer* case was like the contract here with the same provisions and regulations except three on which the intervenor relies to distinguish the two cases. The three exceptions referred to are: (a) In the cited case the contractor was liable to the vendor for the purchase price while here the contract provides the Government shall be liable; (b) Here the contract designates the contractor (WHMS) as Purchasing Agent for the Government, while in the cited case no such provision appears in the contract; and (c) Here the contract provides that title to any purchased article vests immediately in the Government while in the cited case it vested in the Government upon delivery at the site of construction and approval by the Government.

It is our judgment that the distinguishing features set out above are more synthetic than real and that they do not justify a conclusion here different from that reached in the *King and Boozer* opinion.

(a) Appellees lay great stress on the fact that here the Government has obligated itself to pay the vendor and that this indicates the Government was the real purchaser, and say that this feature, which was lacking in the *King and Boozer* case, was a necessary element to sustain the opinion. The cited opinion does contain this phrase: "It is equally plain that they (the contractors) did not

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assume to bind the Government to pay for the lumber . . ." We are not convinced that the court attached the same importance to this feature as appellees do, but we are convinced that there is actually no real difference. Under the terms of the contract here it is hard to see how the credit of the Government could be pledged to the vendor. In the process of buying the tractors the Government (through the Navy Officer in Charge) checked every step in detail. When the sale was finally made the tractors were paid for by WHMS, delivered to the site of construction, and again checked and inspected by the agent. Only then and after WHMS proved to the Government's satisfaction that the purchase price had been paid by WHMS to Kern-Limerick, Inc. did the Government reimburse WHMS. We are convinced that this provision pledging the credit of the Government was not placed in the contract because of any necessity to further protect the interest of the Government, but for another purpose, and may be considered redundant. We understand appelles do not seriously deny this provision was inserted to avoid the effect of the decision in the *King and Boozer* case. Granting the propriety of such purpose, we do not think it effective.

(b) *WHMS as Purchasing Agent.* Much of what was said above applies to this provision of the contract and especially as to the possible purpose of its insertion. Actually, the contractor in the *King and Boozer* case acted as effectively as an agent for the Government as WHMS does under the contract in this case. However, in neither case do we deem it proper to speak of the contractor as

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an "agent" because in each instance he was a contractor (an independent contractor) and was so designated in the contract of employment. Whether WHMS could be legally made an agent for the purpose of making purchases for the Government in this instance will be later discussed.

(c) *Title in the Government.* The fact that under the terms of the contract title to the tractors never rested in WHMS also, as we view the entire case, fails to distinguish this case from the *King and Boozer* case. There the title to the lumber rested in the contractor only until the lumber was delivered and paid for and then title automatically vested in the Government. The practical result was the same in both instances and we are unwilling to say that the legal fiction of divesting WHMS of title momentarily here has any significant bearing on the immunity of the United States from taxation. By no process of reasoning can we see how such a provision was necessary to better protect the interest of the Government, and we again conclude it must have been devised for another purpose.

Before the decision in the *King and Boozer* case Congress had refused to exempt from taxation purchases made by cost-plus contractors in constructing projects for the Government. Since the decision an attempt to evade its effect was made by proposed legislation in the Congress, but, after exhaustive hearings, Congress refused to sanction such enactment. In view of this definite attitude on the part of the Government itself, we think any attempt to reach a different result by skillful legal phraseology should be cautiously considered. We

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recognize the supremacy of the Government in the field of taxation and the urgency of the need for funds by both the State and Federal Governments, but where the interests of the two conflict, it is necessary to have a division line with due respect for both. The idea is well expressed, in the opinion referred to, in this language:

> So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties.

Armed Service Procurement Act of 1947. This Act of Congress will be referred to by sections as it appears in *USCA.,* Volume 41, page 189, Title 41, beginning with Section 151. In some way, appellees urge, this Act strengthens their contention that the United States was the actual purchaser in this instance. Their theory seems to be that the Act gives direct authority to the Navy Department to make purchases for its own use and purposes, that this authority can be delegated to an agent, and that such delegation was made in this instance to WHMS. We do not agree with this interpretation of the Act.

As we see it, the over-all purpose of this Procurement Act was to empower the Navy Department (as well as the Army, Air Force and Coast Guard) to purchase (or contract to purchase) supplies or services for its own *use,* as stated in Section 151. Considering, without holding, the Act authorized the Navy Department to buy an Ammunition

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Dump at Shumaker, Arkansas (had one been in existence) for its use, it does not follow that the Navy Department was authorized to buy nails, lumber, cement, tractors, etc., which were not to be used by the Navy but by WHMS (in this instance) to construct, as independent contractors, the Ammunition Dump.

Delegation of Agency. Appellant takes the position that even if the Navy Department had the authority to make the purchase of the tractors here, it does not have the power under the Act to delegate this power to WHMS in this instance, and we agree with this view.

Section 156 reads as follows:

> § 156. *Determinations and decisions—(a) Powers of agency head; finality; delegation*
>
> The determinations and decisions provided in this chapter to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

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Non-delegable powers; delegation to chief procurement officer only

(b) The power of the agency head to make the determination or decisions specified in paragraphs (12)-(16) of section 151 (c) of this title and in section 154 (a) of this title shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 151 (c) of this title shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000.

From the above we conclude that if the power in this instance was delegable at all, it would be only to an officer or official of the Navy. Here the attempt was to delegate the power to WHMS. It appears probable to us that the purchases here were to be made under paragraphs (12)-(16) of section 151 (c), in which case there was no power to delegate, rather than under paragraph (10) as contended by appellees. Paragraph (10) designates "supplies and services for which it is impracticable to secure competition."

Appellees also contend that section 153 (b) provides the authority for the execution of the contract under consideration. We think they would be right if the purpose of the contract with WHMS had been to buy and accumulate (for the future use of Navy Department) materials, as contended by appellees, is repugnant to the over-all content and purpose of the contract. Not only are the contract-

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ors designated and treated as such in the contract but obviously the only purpose of the contract was to obtain the experience, skill and knowledge necessary to assemble proper materials and services and fashion them into an ammunition depot in the most efficient manner. If the United States had only been interested in obtaining the services of a purchasing agent to buy materials it could, no doubt, have selected a competent Naval Officer at no extra cost to perform that function and, in all events, it could have surely secured the services of such an agent for considerably less than half a million dollars.

Reversed.

Holt and Robinson, JJ., dissent.

George Rose Smith, J., not participating.

Robinson, Justice (dissenting).

No one will contend that if the Government is a *bona fide* purchaser of equipment, a state sales tax should be collected. If the Government is not the purchaser in this instance, it is hard to imagine a situation where it is ever the purchaser. The Government is invisible and intangible and must, necessarily, act through agents and has the exclusive right to appoint its own agent, or agents. Certainly no state has the power to say who can, or who cannot, act as agent for the Government. Moreover, the Government, through its duly appointed agents, has the right, in fact it is the duty of such agents, to avoid incurring unnecessary expenses, including taxes.

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The majority opinion is based primarily on Alabama v. King & Boozer, 341 U. S. 1, 62 S. Ct. 43, 46, 86 L. Ed. 3. An attempt is made to show that there is no real distinction between that case and the case at bar, but, in my opinion, the facts in the two cases are altogether different. None of the facts on which the court based the opinion in the King & Boozer case are present in this case.

In the King & Boozer case the court said: "As the sale of the lumber by King and Boozer was not for cash the precise question is whether the Government became obligated to pay for the lumber and so was the purchaser whom the statute taxes". Then the court pointed out the following facts upon which it based the opinion that the Government was not the purchaser:

(1) The contractor was required to make all such contracts in his own name, and on his own credit, and not bind or purport to bind the Government or the contracting officer.

(2) The Government was not to be bound by the purchase contract.

(3) The purchase order stated that the purchase did not bind or purport to bind the United States Government or Government officers.

(4) The Government's credit was not pledged and the court said: "We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price".

The facts in the present case which distin-

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guish it from those set forth above are as follows:

(1) The Government was bound to pay for the equipment.

(2) The equipment was not bought in the name of the contractor or on the contractor's credit.

(3) The Government's credit was pledged.

(4) The request for bids provides that the contractor shall not acquire title to any of the property purchased.

If the contractor had attempted to divert to his own use property purchased for this Government job, there is no court in the land that would not have enjoined such diversion, upon a showing of the facts in the case. This is true because the contractor had acquired possession of the property as agent of the Government. At no time did the contractor own the property, nor was the contractor liable for the payment of the purchase price, and the property had not been sold on the credit of the contractor. To say here that the Government must pay the sales tax is to say that it can never, at any time, employ a contractor to do any work without paying a sales tax to the state on all material the Government buys and pays for and the contractor uses in doing such work.

For the reasons set out herein, I respectfully dissent.

HOLT, J., concurs in this dissent.

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